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CITATIONS

862384—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 514–515

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES P. MITCHELL

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia, entered October 25, 1943 (R. 58, 59), reversing respondent's convictions of housebreaking and larceny and remanding the cases to the district court for new trials.

OPINION BELOW

The opinion of the court of appeals (R. 55–57) has not yet been reported.

JURISDICTION

The judgments of the court of appeals were entered on October 25, 1943 (R. 58, 59). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether the rule of *McNabb* v. *United States*, 318 U. S. 332, requires a holding that a confession made during detention and prior to arraignment is inadmissible in evidence even though at the time of confession the detention was not illegal, the confession was not given in response to interrogation, and the subsequent delay in arraignment bore no causative relation to the making of the confession.

2. Whether the rule of *McNabb* v. *United States* prevents the use in evidence of property discovered by police officers in a search made without a search warrant but with the defendant's consent given while in detention prior to arraignment.

STATEMENT

In each of two indictments, filed in the United States District Court for the District of Columbia, respondent was charged in separate counts with housebreaking and larceny (R. 3–4, 35–36). He was separately tried under each indictment, and in each case he was found guilty by a jury on both counts (R. 12, 14). In one case he was committed to the custody of the Attorney General for im-

prisonment of from one to three years (R. 14); and in the other case he was given a similar sentence of from one-and-a-half to four-and-a-half years, to run concurrently with the first sentence (R. 44–45). On appeal to the Court of Appeals for the District of Columbia, the judgments of conviction were reversed in a *per curiam* opinion (R. 55–57) relying exclusively upon this Court's decision in *McNabb* v. *United States*, 318 U. S. 332. The circumstances of respondent's arrest and conviction, in which the court below found a violation of the *McNabb* rule, may be thus summarized:

On the night of August 11–12, 1942, the home of Harry G. Meem in Washington had been broken into and various items of personal property, including a pair of cuff links, had been stolen therefrom (R. 20–21).[1] On October 12, 1942, Charles T. Williams, a police officer, found at A. Kahn, Inc., jewelers, a pair of cuff links answering the description of those stolen, which had been purchased by Kahn's on August 13, 1942, from a person giving the name and address of James Mitchell, 1427 *W* Street N.W. (R. 21). This clue led Williams at 2:00 P. M. on October 12th to respondent's home at 1427 *N* Street N.W., where he met and talked with respondent (R. 21–22, 23, 49, 52). Williams then went to Meem's home where the latter identified the cuff links (R. 22). Accompanied by another police officer,

[1] The housebreaking and theft at the Meem home were the charges of the two counts in the first indictment (R. 3–4).

Williams returned to respondent's home at about 7:00 P. M. the same day and asked him to go with them to the precinct station for questioning. Both officers testified that they did not arrest respondent; that he accompanied them without remonstrance; that they did not question him during the ride to the station in their automobile; that they did not then or at any time thereafter use force or make threats or hold out hope of reward or favor, or mistreat respondent in any way; and that upon arrival at the station they told him "that they knew what he had done and told him that he did not have to say anything, but that all they wanted to know was who had worked with him," whereupon he "freely admitted that he had broken into the home of Mr. and Mrs. Meem and admitted that he had taken the cuff links in question as well as the other property which was identified" (R. 18, 19, 22, 23, 49–51). At the same time he admitted having broken into and stolen various items of personal property from the home of Anthony Lucas (R. 50).[2] The entire confession was given at approximately 7:00 P. M., within a few minutes after arrival at the police station (R. 18, 22, 23, 50, 51). Respondent at the same time "told the officers that the goods which he stole were located in various parts of his home on N Street N.W.,

[2] The housebreaking and theft at the Lucas home were the charges of the two counts in the second indictment (R. 35–36).

and gave the officers express permission to go to his home and obtain all the property that was there" (R. 18–19, 22, 23, 50–51), telling them that "some of it was located in two trunks in the basement" (R. 50). Without a search warrant, but pursuant to respondent's expressed consent, the officers then went to his home and secured the stolen property which was introduced in evidence at the trials and there identified (R. 19, 20–21, 23, 49, 50).

Respondent was not taken before a committing magistrate the next morning, but was held at the police station under no charge other than for investigation until October 19th, and was arraigned before a committing magistrate on October 20th—a lapse of eight days (R. 18, 19, 24, 51). The reason for the delay in arraignment was that the officers had recovered from respondent's home property that had been stolen in more than thirty Washington housebreakings and respondent was cooperating with the police and the victims in identifying this property (R. 51).[3] From the beginning respondent "was very cooperative and told the police that he wanted to help them in investigating the various housebreakings in which he was involved, and * * * asked to be kept at the precinct station until the cases were cleared up" (R. 19). While in detention he "was not mistreated in any way but on the contrary

[3] Only the property stolen from the Meem and Lucas homes was, of course, introduced in evidence at the trials below.

was shown every possible courtesy and was on occasions visited by his mother and others" (R. 19).

Shortly before the first case was called for trial, respondent moved to suppress evidence in all the cases pending against him (R. 5–6, 18).[4] After a hearing at which respondent and Officer Williams testified (R. 18–19), the motion was denied by Justice McGuire (R. 7, 19). A similiar motion made in the second case was denied by Justice Laws on the basis of Justice McGuire's prior ruling (R. 40–41, 48). At the trials the evidence of guilt consisted principally of the testimony of the officers to respondent's oral confessions made on the early evening of October 12, 1942 (*supra*, p. 4), and of the property stolen from the Meem and Lucas homes, secured that evening from respondent's home with his consent (*supra*, p. 5), which was identified at the trials by the owners thereof (R. 20–21, 49). Motions were made to exclude the testimony as to the oral confessions, on the authority of the *McNabb* case (R. 22–23, 51–52). Before admitting the testimony in the first case Justice McGuire heard evidence and argument at length out of the presence of the jury, and at the conclusion thereof he remarked, and respondent's counsel agreed, "that the issue

[4] The housebreakings to which respondent confessed had resulted in a large number of indictments, only two of which are involved here.

drawn in the testimony on the motion was one of fact whether the defendant had, at any time, made any admissions to the officers which they affirmed and he denied" (R. 23). The motion was denied (R. 23).[5] The similar motion in the second case was likewise denied by Justice Laws, after a conference with counsel at the bench (R. 51). Respondent took the witness stand at the trials and denied having made the confessions or given consent to the search of his home and removal of the stolen property therefrom. He testified that he was beaten by the officers both in the automobile while en route to the station and thereafter at the station[6] (R. 23–24, 52–53). This evidence was controverted by the Government (R. 22, 25, 51, 53). Motions for directed verdicts were de-

[5] In view of the consensus as to the issue before the judge on the motion, the denial of the motion must be taken as a finding by the trial court that the confessions had been made. Assuming that they were made, there was no issue as to when they were made; for the testimony on behalf of the Government was uniform as to the circumstances under which they were made, and the defendant did not claim that they were made at any other time but, rather, that none had been made at all. The denial of the motion amounts, therefore, to a finding that the confessions were made shortly after 7 o'clock on the evening of October 12th. The court of appeals so assumed in stating the facts for the purpose of considering the application of the *McNabb* case (R. 56).

[6] Respondent testified "that he was beaten continuously from the time he arrived at the precinct station for about fifteen or eighteen hours when he went into what he described as a coma, being unconscious from that time on for a considerable period" (R. 24). However, he admitted on cross-

nied and respondent was convicted in both cases (R. 25, 53).

The court of appeals, reciting as a fact that "after appellant was arrested and brought from his home to the Police Station and interrogated by the officers, the confession obtained and his consent to the search given, he was continued under arrest for more than a week by the police without being brought before a magistrate, commissioner, or court" (R. 56), reversed the convictions on the authority of *McNabb* v. *United States*, 318 U. S. 332. It stated (R. 56) that it "was almost this identical situation which, the Supreme Court in *McNabb* v. *U. S.* said, makes a confession, voluntary or involuntary, inadmissible in evidence on the trial of the case." Although the opinion of the court of appeals is not explicit on the point, the failure to arraign promptly was

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examination "that about midnight of the night of his arrest the police officers took him to his home where they permitted him to feed his dog" (R. 53), and "that the next evening, that is, October 13, 1942, he was taken to Police Headquarters where he was photographed by a police photographer at which time he said nothing to the photographer or anyone else about his physical condition" (R. 24). The photograph was admitted in evidence in refutation of respondent's testimony (R. 25). In view of the finding by the trial court and the verdict of the jury, we have here, as was done in the *McNabb* case, "treated as facts only the testimony offered on behalf of the Government and so much of the [respondent's] evidence as is neither contradicted by nor inconsistent with that of the Government." *McNabb* v. *United States*, 318 U. S. 332, 338–339, footnote 5.

apparently also regarded as vitiating respondent's consent to the search of his premises and seizure of the stolen property, thereby rendering the latter inadmissible in evidence at the trials.

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In holding that the facts of the instant case fall within the rule of *McNabb* v. *United States*, 318 U. S. 332;

2. In holding that the *McNabb* rule precludes the use of evidence procured by a search made pursuant to a defendant's consent given while in detention prior to arraignment;

3. In reversing the judgments of conviction and remanding the cases to the district court for new trials.

REASONS FOR GRANTING THE WRITS

1. As we understand the scope of the rule of the *McNabb* case, it requires that a confession, to be rendered inadmissible by the operation of the rule, must have been given during a period of unlawful detention and in response to interrogation. That this should be the rule was the view of the Advisory Committee appointed by this Court (Order of February 3, 1941, 312 U. S. 717) to assist in the preparation of federal rules of criminal procedure. Rule 5 (b) in the Prelimi-

nary Draft of Federal Rules of Criminal Procedure (May 1943) provided as follows:[7]

> No statement made by a defendant in response to interrogation by an officer or agent of the government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule [Rule 5 (a)].

The proposed rule as thus drafted was regarded by the Committee as resting upon considerations which were "in substance those set forth in the opinion of the court in *McNabb* v. *United States*, although the proposed rule was adopted before the decision of that case" (Preliminary Draft, p. 13). In explanation of the scope of the proposed rule, the Committee stated (Preliminary Draft, pp. 13–14):

> It is to be noted that the proposed rule does not exclude voluntary statements made in response to interrogation by officers unless at the time the statement is made the detention is unlawful under Subdivision (a); interrogation during the permissible period of detention is not prohibited. Even if the detention is unlawful, moreover, voluntary statements made otherwise than in answer to interrogation by government agents are not rendered inadmissible.

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[7] We are informed that the Committee has now deleted Rule 5 (b) from the proposed rules, owing among other things to objections to an attempt to crystallize a rule of evidence in such a codification.

The facts of the *McNabb* case and the language of the opinion are thoroughly consistent with this understanding of the scope of the *McNabb* rule. The court of appeals in the instant case relied expressly upon the following passage in the opinion (318 U. S. at 345):

> The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.

This statement, however, read in its context, clearly relates to the use of confessions secured by interrogation during a period of illegal detention. In the *McNabb* case the testimony of the arresting officers showed clearly that the illegal detention was for the purpose, and continued throughout the process, of the interrogation of the defendants. Three of the defendants were taken into custody between one and two o'clock on a Thursday morning, and were held incommunicado in a barren cell for fourteen hours before the questioning even began. Another was handed over by the local police to the Federal authorities about nine or ten o'clock on Thursday morning, and still another voluntarily surrendered

about eight or nine o'clock Friday morning. All were questioned, both separately and together, for long and short periods, at various times of the day and night, always before at least six officers. The questioning continued until around two o'clock Saturday morning.[8] In stating its conclusion the Court said: "We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted *upon evidence secured under the circumstances revealed here*" (318 U. S. at 347; italics supplied). The opinion is replete with language emphasizing the likelihood of a causative relation between the interrogation during unlawful detention and the confession.[9] The decision establishes, we believe, a rule whereby unlawful detention is presumed to bear a causative relation to confessions given during such de-

[8] The record did not disclose when the defendants were arraigned.

[9] See, for examples, the following quotations:

"The circumstances in which the statement admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon federal law officers" (p. 344).

"Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours" (p. 345).

See also the statement relied upon by the court of appeals in its opinion (*supra*, p. 11).

It is clear, we believe, that all of these statements lay emphasis, implicitly if not expressly, upon the causative relation of the illegality to the confessions.

tention in response to interrogation by Government officers. We believe that it goes no further.

In the present case, on the other hand, the confessions held inadmissible on the authority of the *McNabb* decision were not given in response to interrogation during a period of unlawful detention.[10] There had as yet been no unnecessary delay in arraignment at the time the confessions were given.[11] They were given almost immediately after respondent's arrest.[12] An arraignment early on the following morning of October

[10] According to the police officers, the only interrogation, if it was such, consisted in the fact that they told respondent "that they knew what he had done and told him that he did not have to say anything, but that all they wanted to know was who had worked with him" (R. 22).

[11] In its opinion (R. 56) the court commented that the delay in arraignment was "in the very teeth of the statute which commands arraignment 'immediately and without delay'," citing D. C. Code (1940), Title 4, Sec. 140. This section is clearly inapplicable, since it applies only to arrests for offenses (including misdemeanors and breaches of the peace) committed "in the presence of such member [of the police force], or within his view." The officers, in arresting respondent here, were not acting under this section, but presumably under the general police power to arrest an individual without a warrant on reasonable ground to believe that that individual has committed a felony. See *Maghan v. Jerome*, 88 F. (2d) 1001, 1002 (App. D. C.). The applicable statute requiring prompt arraignment was 18 U. S. C. 595 (one of the statutes relied upon by this Court in its decision in the *McNabb* case), which contains no specific language regarding the time of arraignment.

[12] Although for the purposes of this petition we assume, as did the court below (R. 56) that respondent was arrested, there is even doubt whether this was technically the case. The police officers testified that respondent, when he accompanied them, "was not under arrest" (R. 18).

13th would have constituted, we believe, a sufficiently prompt arraignment.[13] Admittedly the subsequent detention of respondent for a period of seven days without arraignment was unlawful. But it was not during that period that the confessions were given. The subsequent delay in arraignment could not possibly have had a causative relation to the confessions; and therefore all basis for a presumption of such a relationship as applied to the facts of the *McNabb* case, where the confessions were given both in response to interrogation and during the period of unlawful detention, is lacking here.

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[13] We do not believe that under either 18 U. S. C. 595 or the provision of the D. C. Code cited by the court below the duty of an arresting officer requires that he attempt to reach a committing magistrate at his home, or outside of office hours. See *Bullock* v. *United States*, 122 F. (2d) 213, 215 (App. D. C.), certiorari denied *sub nom. Bullock* v. *Rives*, 317 U. S. 627: "Appellant's detention for more than 36 hours without hearing or commitment, which would ordinarily have been unlawful, was perhaps excused by the fact that it occurred on Saturday night and Sunday;" *United States* v. *Ebbs*, 10 F. (2d) 369, 375 (W. D. N. C.): "Nothing, however, but obvious necessity will authorize an officer to lodge a prisoner in jail before an examination and regular commitment by a magistrate. This course may be adopted if the arrest is made in or near night, whereby he cannot attend the magistrate;" *Janus* v. *United States*, 38 F. (2d) 431 (C. C. A. 9), holding on particular facts that detention without a warrant "until office hours" of the magistrate on the day following the arrest was proper. None of these cases was decided under a statutory command for arraignment "immediately, and without delay"; but such an absolute command, even had it been applicable, must presumably be construed reasonably.

2. There is likewise nothing in the holding in the *McNabb* case, or in the language of the opinion, to indicate that the rule renders inadmissible evidence procured by a search made pursuant to a defendant's consent given while in detention prior to arraignment, even under the circumstances of that case. The emphasis placed in the opinion there upon the fact of interrogation would seem to imply that the rule does not necessarily have such an application. But even if the same *desiderata* that are applicable to confessions are to be deemed likewise applicable to consent to search and seizure, that result should, we submit, be made explicit by this Court, rather than left doubtful on the basis of the decision of the court below.

3. The questions presented are of general public importance, and involve a situation in which, we submit, the court of appeals has misconstrued a decision of this Court. Apart from the fact that, as we believe, the decision below was wrong and should be reversed by this Court, the confusion which the decision engenders as to the proper scope of the *McNabb* rule cannot fail to impair substantially the effective and orderly processes of law enforcement. The decision is susceptible of interpretation either as a holding that a confession or other evidence lawfully obtained may be invalidated by subsequent unlawful action on the part of the arresting officers, or as a holding that no confession or other evidence is admissible if

secured during the interval between arrest and arraignment, however short and within the bounds of legality that interval may be. On the first hypothesis, the decision excludes trustworthy evidence for no other purpose than to discipline police officers for unlawful conduct altogether unrelated to the securing of such evidence. On the second hypothesis it excludes trustworthy evidence in the absence of any unlawful conduct whatever. We submit that in either event the result unnecessarily prejudices the public interest in the proof of crime by trustworthy evidence lawfully procured. The proper scope of the *McNabb* rule, as applied to facts such as those involved in this case, is a question of primary importance in the administration of criminal law in the federal courts, and the extension of the rule proposed by the court below is of such doubtful validity and far-reaching consequence as, we submit, to require consideration by this Court."

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[14] The following additional cases also show the extreme lengths to which trial judges are carrying the *McNabb* rule:

United States v. *Wilburn*, Nos. 71877, 72342, United States District Court, District of Columbia. Wilburn, a 17-year-old Negro, had attacked one girl at about 7:00 A. M. on March 17, 1943, and another girl at about 1:00 A. M. on March 18, 1943. He was arrested at about 2:00 A. M. on the night of March 18, and made a verbal confession of the second attack at about 4:00 A. M. At about 5:00 A. M., in the presence of the complaining witness, he reenacted the crime. He signed a written confession of both crimes at about 11:30 A. M. on March 18, and was arraigned before the juvenile court at 3:00 P. M. on the same day. In the first case Justice Letts, on July 2, 1943, granted a new trial because of the

CONCLUSION

For the reasons stated it is respectfully submited that this petition for writs of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

NOVEMBER 29, 1943.

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admission in evidence of the written confession. In the second, Justice Pine, on November 15, 1943, directed a verdict of acquittal, ruling that the Government could not even introduce testimony to the fact of the oral confession at 4:00 A. M. or of the reenactment of the crime about 5:00 A. M. In doing so he remarked that it probably meant "a miscarriage of justice."

United States v. *Neely*, No. 72187, United States District Court, District of Columbia. Neely was arrested about 5:00 P. M. on Saturday, May 9, and was taken before a coroner's inquest at 11:50 A. M. on Monday, May 11. He had made a statement about 8:00 P. M. Saturday evening. Justice Pine, on November 18, 1943, ruled that such statement was inadmissible even for the purpose of contradicting the defendant on his cross-examination.

United States v. *Basil Fedorka* (S. D. N. Y.). Fedorka was apprehended at 7:00 A. M. on May 14, 1943, and was arraigned at 1:00 P. M. the same day. An attempt was made earlier to reach the United States Commissioner, who was absent, and his absence was the only reason for the delay in arraignment until 1:00 P. M. On July 19, 1943, Judge Caffey excluded both the written statement and the oral admissions made between arrest and arraignment.

United States v. *Stokely Delmar Hart* (N. D. Ill.). Hart was apprehended at 7:00 A. M. on Sunday, September 20, 1942, and gave a signed statement at 5:00 P. M. that day. He was arraigned the next morning. At the trial in May 1943, Judge Igoe, in holding the statement inadmissible, ruled that it made no difference that Hart in fact had been arraigned as soon as a United States Commissioner was available at his office.

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